

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 FATIMA ALI,

9 Plaintiff,

10 v.

11 ALBERTO R. GONZALES, et al.,

12 Defendants.

No. C07-591MJP

ORDER DENYING MOTION TO
DISMISS AND/OR REMAND AND
SETTING EVIDENTIARY
HEARING

13
14 This matter comes before the Court on an Order to Show Cause why the Court should not
15 grant Plaintiff Fatima Ali's application for naturalization. (Dkt. No. 2.) The Government has filed a
16 brief that is both a response to the Court's Order to Show Cause as well as a Motion to Dismiss
17 and/or Remand. (Dkt. No. 4.) Having reviewed the Government's Response, Plaintiff's Response
18 (Dkt. No. 5), the Government's Reply (Dkt. No. 7), all documents submitted in support thereof, and
19 the record in this case, the Court DENIES the Government's motion to dismiss and/or remand. The
20 Court will hold an evidentiary hearing on this matter on September 13, 2007 at 1:30 p.m. at which
21 both parties may present evidence regarding whether the Court should naturalize Ms. Ali.

22 **Background**

23 Plaintiff Fatima Ali, an Iraqi refugee, has been a legal permanent resident of the United States
24 since 2000. On October 13, 2005, she filed an application for naturalization with the United States
25 Citizenship & Immigration Services ("USCIS"). On April 5, 2006, Ms. Ali met with USCIS officials
26 for her citizenship interview. Ms. Ali alleges that USCIS accepted her disability-based waiver of the

English and civics testing requirements and told her that “all that remains” is a “name check” by the Federal Bureau of Investigation (FBI). Along with a number of other plaintiffs, Ms. Ali filed a complaint on February 1, 2007, which requested that the Court approve her naturalization application.¹ When she filed her complaint in this Court, more than nine months had passed since Ms. Ali’s interview, and the Government had not acted on her naturalization application. The Government maintains that it cannot process Ms. Ali’s naturalization application because her background investigation, specifically her name check, is not yet complete.

Discussion

I. Jurisdiction

The Court has jurisdiction over this matter. As the Government is well aware, this Court has previously decided that it has subject matter jurisdiction over this type of case under 8 U.S.C. § 1447(b). Aslam v. Gonzales, No. C06-614, 2006 U.S. Dist. LEXIS 91747 (W.D. Wash. Dec. 19, 2006); Said v. Gonzales, No. C06-986, 2006 U.S. Dist. LEXIS 67750 (W.D. Wash. Sept. 21, 2006). 8 U.S.C. § 1447(b) provides as follows:

If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter.

Under this authority, the Court has jurisdiction over this matter if USCIS has not made a naturalization determination within 120 days of “the examination.” Defendants argue that the Court should follow the reasoning of Danilov v. Aguirre, 370 F. Supp. 2d 441 (E.D. Va. 2005), and hold that the Court lacks jurisdiction over this matter until 120 days after the Government completes its entire background investigation of Plaintiff. The Court declines to follow the reasoning in Danilov,²

¹ The original complaint was filed under case number C07-164. By order dated April 23, 2007, the Court granted a motion to sever filed by Defendants and severed the claims of the fifteen plaintiff into individual actions.

² The Fifth Circuit and a minority of district courts have agreed with the reasoning in Danilov. See, e.g., Walji v. Gonzales, 489 F.3d 738 (5th Cir. 2007); Damra v. Chertoff, No. 1:05CV0929, 2006 U.S. Dist. LEXIS 45563 (N.D. Ohio June 23, 2006); El Kassemi v. Dept. of Homeland Security, No. 06-ORDER - 2

1 and instead agrees with the majority of district courts to consider the issue, which have concluded
2 that the word “examination” in § 1447(b) refers to the date of the examination interview with a
3 USCIS officer, and not the entire examination process. See, e.g., Kheridden v. Chertoff, No. 06-
4 4792, 2007 U.S. Dist. LEXIS 13571, at *8-13 (D. N.J. Feb. 27, 2007); El-Daour v. Chertoff, 417 F.
5 Supp. 2d 679, 681-83 (W.D. Pa. 2005). The statute and accompanying regulations use the term
6 “examination” to refer to the interview date, not, as the Danilov court concluded, the entire process
7 of conducting the interview and completing the background checks. See 8 U.S.C. § 1447(b) (stating
8 that the operable date is the “date on which the examination is conducted”) (emphasis added); 8
9 C.F.R. § 335.1 (mandating that USCIS “conduct an investigation of the applicant” that includes “a
10 review of all pertinent records, [and] police department checks. . . .”); 8 C.F.R. § 335.2(b) (stating
11 that full criminal background check must be completed before examination is conducted); see also
12 United States v. Hovsepian, 359 F.3d 1144, 1151 (9th Cir. 2004) (noting that the “statute provides
13 that, if the INS fails to make a decision regarding a naturalization application within 120 days of an
14 applicant’s first interview,” the applicant may seek a judicial hearing on the matter). Thus, the Court
15 has jurisdiction if USCIS fails to make a decision on the naturalization application within 120 days of
16 the applicant’s interview.

17 Ms. Ali was interviewed by USCIS on April 5, 2006, triggering the start of the 120-day
18 period. Nine months elapsed between the date of her interview and the filing of her complaint on
19 February 1, 2007. This period exceeds the 120-day time limit required under section 1447(b).
20 Because over 120 days elapsed since Plaintiff’s “examination,” this Court has jurisdiction over
21 Plaintiff’s naturalization application under § 1447(b). Defendants’ motion to dismiss is therefore
22 DENIED.

23 **II. Statutory & Regulatory Framework Regarding Background Checks**

24 Congress has prescribed several naturalization eligibility requirements, including that the
25 applicant be lawfully present in the United States for at least five years immediately preceding the

26 1010, 2006 U.S. Dist. LEXIS 74516 (D. N.J. Oct. 13, 2006).

1 date of filing and be a person of good moral character. 8 U.S.C. § 1427(a). Congress also requires
 2 that a lawful permanent resident undergo a “personal investigation” when applying for naturalization.
 3 See 8 U.S.C. § 1446(a). In 1997, Congress emphasized the importance of background checks when
 4 it passed legislation mandating that “none of the funds appropriated or otherwise made available to
 5 the Immigration and Naturalization Service shall be used to complete adjudication of an application
 6 for naturalization unless the Immigration and Naturalization Service has received confirmation from
 7 the Federal Bureau of Investigation that a full criminal background check has been completed”
 8 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations
 9 Act, 1998, Pub. L. No. 105-119, Title I, 111 Stat. 2440, 2448 (1997), reprinted in Historical and
 10 Statutory Notes following INA § 335, 8 U.S.C. § 1446 (“Criminal background check as prerequisite
 11 to adjudication of application for naturalization”). Regulations describe the minimum requirements
 12 for investigating the applicant:

13 The investigation shall consist, at a minimum, of a review of all pertinent records, police
 14 department checks, and a neighborhood investigation in the vicinities where the
 15 applicant has resided and has been employed, or engaged in business, for at least the
 16 five years immediately preceding the filing of the application.

17 8 C.F.R. § 335.1. As part of its investigation, USCIS conducts various security and background
 18 checks, including: (1) an FBI fingerprint check for information related to an applicant’s criminal
 19 history; (2) an Interagency Border Inspection System name check for information regarding national
 20 security risks, public safety issues, and other law enforcement concerns from multiple law
 21 enforcement and intelligence agencies; and (3) an FBI name check, which is run against FBI
 22 investigative databases containing administrative, applicant, criminal, personnel and other files. (See
 23 Harrison Decl. ¶ 4 & April 25, 2006 USCIS “Fact Sheet: Immigration Security Checks — How and
 24 Why the Process Works”.)

25 **III. Name Check Requirement**

26 In her response to the Government’s motion to dismiss, Ms. Ali argues that a full background
 check has already been completed and that USCIS’s policy of requiring a name check is ultra vires.
 Ms. Ali argues that the applicable statute and regulations only require that USCIS do a full criminal

1 background check, which, she argues, does not include a “name check.” The Court does not need to
2 address this argument here. Ms. Ali has not brought an affirmative motion challenging the validity of
3 the name check. Moreover, the Court does not need to decide whether the name check requirement
4 is ultra vires to resolve the present motion. Ms. Ali is not precluded from raising this issue again in
5 later briefing.³

6 **IV. Available Relief**

7 USCIS has failed to make a determination on Ms. Ali’s naturalization application within 120
8 days of her examination. Plaintiff requests that the Court either order that her application for
9 naturalization be granted immediately or set a hearing on this matter. Defendants argue that the
10 Court should either (a) remand to USCIS with instructions to adjudicate Ms. Ali’s application once
11 USCIS receives the name check results, or (b) conduct a full trial on the merits at which Ms. Ali will
12 bear the burden of demonstrating that she meets all naturalization requirements.

13 As the Court explained in Aslam, the Court is not equipped to conduct the kind of
14 investigation required to determine whether an applicant presents a risk to national security or public
15 safety. See El-Daour, 417 F. Supp. 2d at 684. Nevertheless, the Court is disturbed by the possibility
16 that a determination on Ms. Ali’s naturalization application will be endlessly delayed. Ms. Ali is
17 “understandably anxious to complete the naturalization process so [s]he can fully enjoy the benefits of
18 United States citizenship.” Id. at 683 (quoting Alkenani v. Barrows, 356 F. Supp. 2d 652, 657 (N.D.
19 Tex. 2005)).

20 Considering both the Government’s interest in public safety and national security and Ms.
21 Ali’s individual interest in having her naturalization application adjudicated, the Court concludes that
22 it is appropriate to hold an evidentiary hearing on whether Ms. Ali should be naturalized. The hearing
23 is set for September 13, 2007 at 1:30 p.m. in the courtroom of the Honorable Marsha J. Pechman in
24 the U.S. District Court at 700 Stewart Street in Seattle, WA. Because similar issues and arguments

25
26 ³ In her response to the Government’s motion, Plaintiff also suggests that the Court may order
the FBI to complete her name check. The Government maintains that the Court lacks the authority to
issue such an order. Again, however, the Court need not decide this issue to resolve the pending motion
to dismiss or remand.

1 have been raised in several cases currently pending before the Court, the Court will hold a
2 consolidated hearing for the following four cases: (1) Alghawi v. Gonzales, C07-586; (2) Finchan v.
3 Gonzales, C07-587; (3) Ali v. Gonzales, C07-591; and (4) Abo Ghanim v. Gonzales, C07-596. The
4 Court will set aside two hours for the consolidated hearing, with the time equally divided between
5 Plaintiffs and Defendants. If the parties wish to conduct discovery before the hearing, they may ask
6 the Court to set a schedule for doing so.

7 **Conclusion**

8 Ms. Ali has been a lawful permanent resident of this country for seven years. She has been
9 waiting for the Government to make a decision on her naturalization application for more than a year
10 since her interview. The Government has failed to do so in a timely manner. Because this Court has
11 jurisdiction, the Government's motion to dismiss or remand is DENIED, and this case is set for an
12 evidentiary hearing on September 13, 2007 at 1:30 p.m. If the Government determines that it is ready
13 to make a decision on Ms. Ali's application before that date, it may file a motion to remand or the
14 parties may file a stipulated and proposed order of remand and dismissal.

15 The clerk is directed to send copies of this Order to all counsel of record.

16 Dated: August 6, 2007.

17
18 s/Marsha J. Pechman
19 Marsha J. Pechman
20 United States District Judge
21
22
23
24
25
26